



1 the motion for partial summary judgment in Defendants' favor (ECF No. 61). Following  
2 the issuance of that order, Defendants filed a motion to dismiss (ECF No. 70). This  
3 Court denied the motion to dismiss because Plaintiff had alleged facts to state a claim  
4 upon which relief can be granted under the Rule 8(a)(2) pleading requirement (ECF No.  
5 77). Defendants also filed a motion for attorney's fees (ECF No. 66) which was denied  
6 without prejudice for failure to follow the local procedural rules (ECF No. 78).  
7 Defendants then filed a motion for reconsideration, requesting that the Court reconsider  
8 the original motion to dismiss under the motion for summary judgment standard (ECF  
9 No. 79). This Court ultimately denied the motion to reconsider which could have  
10 resulted in dismissing the entire case (ECF No. 85).

11 Defendants filed the Amended Motion for Attorneys Fees and Costs on January  
12 14, 2011 (ECF No. 80). The current procedural posture of this case is that the parties  
13 have submitted their joint pretrial order to the court and have indicated their intent to  
14 proceed to trial. Partial summary judgment has been granted in favor of Defendants  
15 (ECF No. 61), and the only remaining issue for trial is whether or not Plaintiff is entitled  
16 to a punitive damages award based on his discrimination, retaliation and wrongful  
17 termination claims under Title VII and Nevada Law.

## 18 **DISCUSSION**

### 19 **A. Costs**

20 Rule 54(d)(1) entitles the prevailing party to reasonable costs. Fed. R. Civ. P.  
21 54(d)(1). Defendants submit an itemization of costs for an amount totaling \$1,448.39.  
22 (See Exhibit A, ECF No. 80-1.) Although this itemization covers costs for essentially the  
23 entire litigation period, Defendants state that this is the amount incurred in prevailing on  
24 the motion for partial summary judgment. Given that the only remaining claim is for  
25 punitive damages, which is derivative to the claims found in favor of Defendants, the  
Court determines that the itemization is correct and reasonable. Defendants would not

1 expend any additional resources for the punitive damages claims in defending against the  
2 claims of NIED, IIED and front and back pay damages. Defendants' motion for costs is  
3 GRANTED.

4 **B. Attorneys' Fees**

5 Each party in a lawsuit ordinarily shall bear its own attorney's fees; this is known  
6 as the "American Rule." *Hensley v. Eckerhart*, 461 U.S. 424, 429 103S.Ct. 1933, 1937  
7 (1983). However, Rule 54(d)(2) authorizes a federal court to award attorney fees only if  
8 there is a valid contract that provides for the award, an express statutory authority or rule  
9 authorizing the award, or if the court awards fees pursuant to its inherent equitable power  
10 in the interest of justice. *See U.S. v. Standard Oil Co. of California*, 603 F.2d 100 (9th  
11 Cir. 1979). Defendants fail to provide any persuasive basis for a Rule 54(d)(2) award fo  
12 attorney's fees.

13 Defendants only cited to N.R.S. §18.010 as the statutory authority that would  
14 allow them to recover attorney's fees in this case. This court cannot look to state law to  
15 award attorneys' fees because this court's jurisdiction is not based on diversity  
16 jurisdiction. Furthermore, Defendants' argument for recovering attorneys' fees relates to  
17 misconduct on the part of the Plaintiff's attorneys and Plaintiff himself during discovery.  
18 Defendants argue that the claims and litigation practice was frivolous and involved  
19 failures to designate witnesses, untimely responses and numerous emergency motions.  
20 However, when attorney fees are based upon misconduct by an attorney or party in the  
21 litigation itself, rather than upon a matter of substantive law, the matter is procedural, for  
22 purposes of determining whether to apply state or federal law. *In re Larry's Apartment,*  
23 *L.L.C.*, 249 F.3d 832 (9th Cir., 2001). Thus, Defendants must demonstrate that a federal  
24 statute or rule that would allow the court to award attorney's fees.

25 Although not prominent in Defendant's motion they do mention that 42 U.S.C. §  
2000e-5(k) allows the court, in its discretion, to grant the prevailing party a reasonable

1 attorney's fee. Under this statute, a court may award attorney fees only if it finds that the  
2 plaintiff's action was frivolous, unreasonable, or without foundation, even though not  
3 brought in subjective bad faith. *See Harris v. Maricopa County Superior Court*, 631 F.3d  
4 963 (9th Cir. 2011). "In determining whether this standard has been met, a district court  
5 must assess the claim at the time the complaint was filed, and must avoid post hoc  
6 reasoning by concluding that, because a plaintiff did not ultimately prevail, his action  
7 must have been unreasonable or without foundation." *Id.* (citing *Tutor-Saliba Corp. v.*  
8 *City of Hailey*, 452 F.3d 1055, 1060 (9th Cir. 2006) (quotation marks omitted)). A  
9 district court may also award attorney's fees to a prevailing defendant if the plaintiff  
10 continued to litigate after it clearly became frivolous, unreasonable, or groundless.  
11 *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422, 98 S.Ct. 694 (1978).

12 This Court finds that Plaintiff's Complaint was not frivolous, unreasonable or  
13 without foundation when originally brought. This is evidenced by this Court refusal to  
14 dismiss Plaintiff's Complaint or Amended Complaint in entirety. (*See* ECF No. 28). A  
15 December 2008 Stipulation by the parties requested that this Court grant a continuance  
16 due to the fact that Plaintiff's counsel had suffered a stroke and new counsel had to be  
17 retained (ECF No. 35). Although Plaintiff's participation (or lack thereof) in discovery,  
18 is not conduct that this court would recommend other parties follow, Plaintiff never fully  
19 stopped participating in the litigation, seemed to try to correct the mistakes when new  
20 counsel was hired. Therefore, as the initiation of the lawsuit was not frivolous,  
21 unreasonable or without foundation when originally brought, the court will not award  
22 attorney's fees.

23 However, the Court does question Plaintiff's continued adherence to a punitive  
24 damages claim.<sup>1</sup> Most if not all of Plaintiff's exhibits have deemed excluded by prior  
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<sup>1</sup> The Court will not revisit the issue, but will remark that this case has been a procedural nightmare.

1 rulings of this Court. (*See* Order, ECF No. 61.) It is difficult for the Court to imagine  
2 what evidence Plaintiff will offer, although he continues to profess of such evidence.  
3 Therefore, the Court will revisit the issue of attorney's fees after trial. If the Court then  
4 finds that Plaintiff continued to pursue his punitive damages claim in frivolity after it was  
5 clear that he had no evidence to support such a claim, the Court will award attorney's  
6 fees to Defendants for the work incurred following the Order on partial summary  
7 judgment until final judgment.

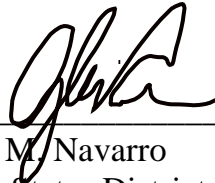
8 **CONCLUSION**

9 IT IS HEREBY ORDERED that Defendants' Motion for Attorneys' Fees and  
10 Costs (ECF No. 80) is GRANTED in part and DENIED in part.

11 Defendant is awarded its costs in the amount of \$1,448.39.

12 Defendants' Motion for Attorney Fees is DENIED without prejudice in  
13 accordance with this Order.

14 DATED this 15 day of September, 2011.

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18 Gloria M. Navarro  
19 United States District Judge  
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